HO LAI YING & ANOR

v.

CEMPAKA FINANCE BHD

COURT OF APPEAL, KUALA LUMPUR
ALAUDDIN MOHD SHERIFF JCA
MOHD GHAZALI YUSOFF JCA
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: W-03-151-2000]
22 DECEMBER 2003

CIVIL PROCEDURE: *Summary judgment - Appeal against - Bona fide triable issues of fact or law, whether any - Finance company obtaining summary judgment against borrower and guarantor - Certificate of indebtedness, whether conclusive - Whether sufficient by itself to establish prima facie case of indebtedness - Whether affidavit in support of application for summary judgment must show how sum claimed was calculated - Whether summary judgment should be set aside*

CONTRACT: *Claim for moneys lent - Certificate of indebtedness - Whether final, conclusive and binding - Application by finance company for summary judgment against borrower and guarantor - Whether affidavit in support of application must show how sum claimed was calculated - Whether finance company established prima facie case of indebtedness*

This was an appeal from the decision of the judge-in-chambers upholding the decision of the senior assistant registrar allowing the plaintiff/finance company to enter summary judgment against the defendants on a claim for moneys lent arising from a loan agreement. The plaintiff had earlier granted a loan facility of RM1,500,000 to the 1st defendant the repayment of which was guaranteed by the 2nd defendant.

Held (allowing the appeal):
Per Mohd Ghazali Yusoff

[1a] 'Summary judgment' is a procedural device available for the expeditious disposition of an action without trial where there is **no** dispute as to the facts and the law. It is a very special jurisdiction and is only to be invoked in cases where there are no *bona fide* triable issues. In the instant case, however, the defendants had challenged the correctness of the plaintiff's certificate of indebtedness – contending that the plaintiff had

failed to produce any statements of accounts to verify the sum it claimed, and also that the plaintiff's claim for additional interest on the accrued monthly repayments in default at the rate of 1% per annum was improper. (pp 236 e-h & 237 a-d)

[1b] The plaintiff's certificate of indebtedness would only be conclusive evidence if the plaintiff's affidavit in support of its application for summary judgment had illustrated how the sum it claimed was arrived at. The mere production of the certificate of indebtedness was insufficient to show that the plaintiff had clearly established that the sum it claimed was due and owing. The court could **not** just assume that the amount shown by the plaintiff was correct. The plaintiff's evidence, thus far, was insufficient to establish a *prima facie* case of indebtedness against the defendants. (pp 237 d-e, h-i & 238 a-d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan hakim dalam kamar kerana mengekalkan keputusan penolong kanan pendaftar yang membenarkan plaintif/bank memasukkan penghakiman terus terhadap defendan-defendan berkaitan satu tuntutan untuk wang yang terhutang yang berbangkit dari satu perjanjian pinjaman. Plaintif sebelumnya telah memberikan pinjaman sebanyak RM1,500,000 kepada defendan pertama pembayaran balik mana telah dijamin oleh defendan kedua.

Diputuskan (membenarkan rayuan):
Oleh Mohd Ghazali Yusoff HMR

[1a] 'Penghakiman Terus' adalah satu kaedah prosedur bertujuan untuk melupuskan tindakan dengan cepat tanpa perbicaraan di mana tidak terdapat pertikaian berkaitan fakta mahupun undang-undang. Ia adalah satu bidang kuasa khas dan hanya boleh dilaksanakan dalam kes-kes di mana tidak terdapat secara bona fide isu-isu yang boleh dibicarakan. Bagaimanapun, dalam kes semasa, defendan-defendan telah mencabar kesahihan sijil keberhutangan plaintif – dengan berkata bahawa plaintif telah gagal mengemukakan apa-apa penyata akaun bagi mengesahkan jumlah yang dituntut, dan juga bahawa tuntutan plaintif untuk faedah tambahan atas pembayaran balik ingkar yang terakru sebanyak 1% setahun adalah tidak wajar.

[1b] Sijil keberhutangan plaintif akan hanya menjadi keterangan konklusif jika afidavit sokongan bagi permohonan penghakiman terus plaintif ada menjelaskan bagaimana jumlah yang dituntut itu dicapai. Mengemukakan sijil keberhutangan semata-mata adalah tidak memadai bagi menunjukkan

bahawa plaintif telah membuktikan dengan jelas bahawa jumlah yang dituntut itu adalah sebenarnya terhutang. Mahkamah tidak boleh sewenang-wenangnya membuat andaian bahawa jumlah yang ditunjukkan oleh plaintif sebagai betul. Keterangan plaintif, setakat yang dikemukakan, tidak mencukupi untuk mewujudkan satu kes *prima facie* terhadap defendan-defendan.

Case(s) referred to:
Bank of Commerce (M) Bhd v. Tan Boon Soon & Anor [1995] 1 CLJ 69 HC ***(refd)***
Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(foll)***
Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd [1972] 1 MLJ 168 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 101

For the appellants - SL Tan; M/s SL Tan & Assoc
For the respondent - Nadrah Mohamed; M/s Shatar Tan & Chee

[Appeal from High Court, Kuala Lumpur; Civil Suit No: D3-22-1701-1998]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Ghazali Yusoff JCA:

On the application of the 1st appellant, the respondent, a finance company, gave a fixed loan facility of RM1,500,000 to the former *vide* loan agreement dated 17 July 1996 ("the said agreement"). The 1st appellant had agreed to repay the said facility with interest at the rate of 2% per annum above the respondent's base lending rate, which as at 1 December 1997 was 12.30% per annum, with monthly rests by 180 instalments of RM18,003 per month commencing 30 August 1996, ie, one month after the loan amount is fully released, subject to the terms and conditions contained in the said agreement. Pursuant to a guarantee agreement also dated 17 July 1996, the 2nd appellant guaranteed to pay the respondent on demand all or any of the 1st appellant's debts to the respondent under the said agreement. The 1st appellant defaulted and consequently did not respond to letters of demand issued by the respondent.

On 29 May 1998 the respondent instituted legal proceedings against the appellants and claimed the sum of RM1,554,019.74 due and owing as at 29 November 1997 together with interest accruing thereon commencing 30 November 1997 and an additional interest accruing on the defaulted monthly instalments at the rate of 1% per annum calculated on a daily basis from 30 November 1997 till the date of full settlement.

On 17 August 1999 the learned senior assistant registrar gave summary judgrpent against the appellants under O. 14 of the Rules of the High Court 1980. The appellants' appeal to the judge in chambers was dismissed. Against that decision the appellants appealed to this court.

From our perusal of the respondent's affidavit filed in support of their application for summary judgment, we noticed that besides a copy of the said agreement and the guarantee agreement, the only other document exhibited was a certificate of indebtedness (exh. P3). Exhibit P3 reads:

DALAM PERKARA GUAMAN SIVIL NO. D3-22-1701-1998

DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR

ANTARA

CEMPAKA FINANCE BERHAD ... PLAINTIF

DAN

1. HO LAI YING
(BERNIAGA ATAS NAMA K.H. TRADING)

2. KOR TOONG KHOON ... DEFENDAN-DEFENDAN

PERAKUAN

Saya CHOO HONG CHUEN (No. K/P: 600901-10-6611) seorang Pengurus Cawangan Kuala Lumpur pihak Plaintif dengan ini memperakui dan mengesahkan Ho Lai Ying (berniaga atas nama K.H. Trading) dan Kor Toong Khoon, Defendan-defendan yang dinamakan di atas berhutang kepada Plaintif sebanyak RM1,554,019.74 pada setakat 29/11/97 dengan faedah di atas jumlah tersebut mulai 30/11/97 pada kadar 2% setahun di atas Kadar Asas Pinjaman Plaintif (yang pada setakat 1/12/97 adalah 12.30% setahun) pada kadar asas bulanan sehingga penyelesaian sepenuhnya dan faedah tambahan di atas iumlah ansuran yang terakru pada kadar 1% setajiur) di atas jumlah tersebut yang dikira pada asas harian dari 30/11/97 sehingga penyelesaian sepenuhnya.

Bertarikh pada 19 haribulan APR 1999.

(tt)

CHOO HONG CHEUN

We also noted that the appeal records showed that learned counsel for the appellants challenged the correctness of exh. P3. He argued that the respondent failed to produce supporting documents such as the statement of accounts to

show the quantum of the sum claimed. He also complained about the additional interest of 1% per annum imposed over and above the sum claimed as due and owing.

From our reading, as against the 1st appellant, exh. P3 would seem to have been issued pursuant to cl. 27 of the said agreement which reads:

> If and when the Loans shall be withdrawn or revoked and/or the said account or accounts whatsoever in respect thereof shall be closed a statement by the ... Manager ... as to the amount of such balance and the money and liabilities for the time being incurred or due to the Lender by or from the Borrowers(s) shall be accepted by the Borrowers(s)... as final and conclusive evidence for all purposes whatsoever including for purposes of legal proceedings.

As against the 2nd appellant, exh. P3 would seem to have been issued pursuant to cl. 7.03 of the guarantee agreement which reads:

> It is hereby agreed that ... a statement of account in writing showing the indebtedness of the Borrower(s) in relation to the subject matter of this Agreement duly certified by an authorised officer of the Lender shall be binding and conclusive against the Guarantor(s) ... .

Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff without trial when there is no dispute as to fact or law. In *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 the learned judge observed:

> The effect of Order 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no *bona fide* triable issues.

In *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85, the learned judge said:

> The purpose of O. 14 of the Rules of the Supreme Court 1957 is to enable the plaintiff to obtain summary judgment without trial if he can prove his case clearly, and if the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried, final judgment should be allowed.

Thus a plaintiff would be entitled to obtain summary judgment without trial if he can prove his case clearly which to us would mean the plaintiff has to establish the existence of certain facts and must prove that those facts exist before the court can determine the issue as to whether the defendant has a defence or has raised an issue against the claim which ought to be tried.

In the instant case, in their affidavit in support of the application, as mentioned earlier, the respondent introduced the following documents:

(i) the said agreement (exh. P1);

(ii) the guarantee agreement (exh. P2); and

(iii) the certificate of indebtedness (exh. P3);

(hereafter referred to collectively as "the said documents").

In their affidavit in opposition, the appellants, as stated earlier, had challenged the correctness of exh. P3 and pointed out that the respondent failed to produce supporting documents to show the correctness of the sum claimed.

The sole question before us is whether the respondent had sufficiently established their case against the appellants, namely, that the appellants as at 29 November 1997 owed the respondent the said sum of RM1,554,019.74. We do not think so. Exhibit P3 would only be conclusive evidence if it had been illustrated in the respondent's affidavit in support of their application for summary judgment as to how the sum mentioned therein was arrived at. It is our view that the mere production of exh. P3 was insufficient to show that the respondent had clearly established that the said sum was due and owing. The court cannot just assume that the amount shown therein is correct. No documentary evidence such as in the form of monthly statement of accounts and the amount of interest imposed on the monies released were introduced by the respondent. Under the circumstances, we cannot come to the conclusion that the respondent had clearly proven their case. In *Esso Standard Malaya Bhd v. Southern Cross Airways (Malaysia) Bhd* [1972] 1 MLJ 168, Raja Azlan Shah J (as His Majesty then was) said (at p. 171):

> It is I think right that an order under RSC Order 14 should be made only if the court thinks it is a plain case and ought not to go for trial. If one simply has a short matter of construction with a few documents, the court on summary judgment should decide what in its judgment is the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed.

All the said documents showed is that the said facility was granted to the first appellant with the second appellant as the guarantor. What we were gravely concerned with is whether the evidence introduced up to now is sufficient *prima facie* to establish the respondent's case. The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950. In accordance with s. 101 of the Act, the legal burden of establishing

that the said sum stated in exh. P3 is owing from the appellants to the respondent rests on the latter. The conclusiveness of exh. P3 is binding only upon the parties. The court would still have to determine whether sufficient evidence has been adduced to prove the quantum and correctness of the amount claimed by the respondent. In *Bank of Commerce (M) Berhad v. Tan Boon Soon & Anor* [1995] 1 CLJ 69, T Selventhiranathan JC (as he then was), in dismissing an appeal against the decision of the learned senior assistant registrar in refusing the plaintiff's application for summary judgment to be entered against the 2nd defendant who was the guarantor for certain credit facilities granted to the 1st defendant, said the failure of the plaintiff "to disclose how the sum claimed was arrived at or whether any credit was given for amounts paid or realized in accordance with the guarantee so as to enable it to arrive at the ultimate balance after the deduction of all payments made or amounts realized, raised triable issues which merited determination only after a full hearing". We would fully agree with him.

On the whole it is our view that the evidence adduced by the respondent for the purpose of this application is lacking in certain particulars which would entitle them to enter final judgment against the appellants. Seeing that the appellants dispute the indebtedness in relation to interest imposed which is an issue which ought to be tried, we allowed the appeal with costs.